of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the states."

Again it is said in that case:

"The right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government stand upon as solid a ground, and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal Government officer in *Dobbins v. Erie Co. (16 Pet. 435)* from taxation by the state; for in this respect that is, in respect to the reserved powers, the state is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it, are necessarily, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in one case is as essential as in the other."

In *Pollock v. Farmers Loan and Trust Company, 158 U. S. 601,* in the opinion delivered after the re-argument of that case, the Court speaking through Chief Justice Fuller said, at page 637:

"We had unanimously held so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states and their instrumentalities to borrow money and consequently repugnant to the Constitution."

In *Ambrosini v. United States, 187 U. S. 1,* it was held that the Federal Government had no power to tax bonds furnished dram shop keepers in order to comply with the law of Illinois. The Court said at page 7:

"The granting of the license was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of state and municipal action on the subject, and assumes the power to suppress such action. And considering license and bond together, taxation of the bond involves the same consequences.

* * *

The general principle is that, as the means and the instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the states, so are those of the state exempt from taxation by the general government. It rests on the law of self-preservation for any government whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government exists only at the mercy of the latter. *Nelson J., the Collector v. Day, 11 Wall. 113, sub. nom. Buffington v. Day, 20 L. ed. 122.*"

In that case as in the case at bar the tax was imposed upon a citizen of the state and not on the state itself, but it was imposed by reason of a transaction with the state.

The rule being the same with respect to the rights of States to tax instrumentalities of the Federal Government. Decisions dealing with that right are pertinent.

In *Gillespie v. Oklahoma, 257 U. S. 501,* the Court speaking through Mr. Justice Holmes, held that a state could not impose a tax upon the net income of Mr. Gillespie, which he derived from sales of oil and gas received under leases of restricted Indian lands.

Oklahoma contended that its tax was upon its citizen, Mr. Gillespie, and that he was not an instrumentality of the Federal Government, just as it might be contended here that the tax was upon the Indian Motorcycle Company and it was not an instrumentality of the state government, but that contention did not prevail.

In the case of *Western Union Telegraph Company v. The State of Texas, 105 U. S. 560,* it was held that a state could not tax telegraph companies upon messages sent for the United States, and to the same effect is *Williams v. City of Talladega, 226 U. S. 404,* in which it was held that a license tax upon the privilege of sending telegraphic messages was invalid, since it made no exception in favor of messages sent for the United States.

In *Williams v. City of Talladega, 226 U. S. 404,* the Court said at page *419:*

> "We have, then, an ordinance which taxes, without exemption the privilege of carrying on a business, a part of which is that of a governmental agency constituted under a law of the United States and engaged in an essential part of the people's business—communication between the officers and departments of the Federal Government. The ordinance, making no exception of this class of business, necessarily includes its transaction within the privilege tax levied. This part of the license exacted necessarily affects the whole, and makes the tax unconstitutional and void."

In *A. G. Spalding & Brothers Co. v. Edwards, Collector, 262 U. S. 66,* it was held that export sales of baseballs and bats were not subject to tax under *Section 600 of the Revenue Act of 1917,* which section also taxed motorcycles. It was held that if these export sales were subject to tax they would violate the provision of the Constitution prohibiting a tax "on articles exported from any state".

The case of Panhandle Oil Company v. The State of Mississippi, 277 U. S. 218.

If the rule which prevents the states taxing the instrumentalities of the Federal Government is no broader than that which prevents the Federal Government taxing the instrumentalities of the states, then the case at bar is obviously governed by *Panhandle Oil Company v. Mississippi, 277 U. S. 218.*

It is respectfully submitted that this Court should be as vigilant in protecting the rights of the states from Federal aggression as it is in protecting the rights of the Federal Government from state aggression.

Assuming that the right of the states to be free from taxation by the Federal Government is as broad as that of the Federal Government to be free from taxation by the states, it is hard to reconcile the views in the dissenting opinion of Mr. Justice Holmes in the case of *Panhandle Oil Company v. Mississippi, 277 U. S. 218,* with the views expressed by him in *Gillespie v. Oklahoma, 257 U. S. 501.*

It is further respectfully submitted that "a government of laws and not of men" is more desirable than a government of men and that the Anglo-Saxon system which is based upon precedent is far more desirable than the system administered by the Mandarins of China under which each Mandarin does what he thinks to be right and it is further submitted that great constitutional principles ought not to change with the personnel of the Court which interprets them. In a time when respect for law is desirable it is submitted that it does not conduce to that respect to have constitutional principles change with the personnel of the Court. The thought here expressed is something far more important than this case.

The Argument for the Validity of the Tax.

The argument for the validity of the tax is contained in the opinion of former Attorney General Palmer, which states:

> "The tax is laid upon the manufacturer, and while it is probable that he will pass it on to the consumer, the tax itself is not laid upon the consumer. The burden therefore, if it falls upon the state, does so indirectly."

It may be further argued that the Federal Government has the right to tax income of corporations derived from casual sales to a state and it should therefore have the right to exact an excise tax on those sales.

An answer to this argument is that excise taxes on sales to the state although laid upon the vendor are in reality passed on to and paid by the state, while this is not true of income taxes.

Those who have studied the subject with a background of practical experience generally concede that the income tax is one tax which is not and cannot be successfully passed on to the consumer. The income tax is only upon profits and anything which comes out of profits does not enter into the cost of the articles sold. Prices of articles purchaseable on the open market are fixed by competition and cost.

The sales tax on the other hand is a tax which can easily be and is universally passed on to the consumer. When one buys a ticket for a play, the tax on the sale of the ticket is passed to the purchaser and the same is true with every other article on which there is a sales tax.

Congress knew that the tax involved here would be passed on to and paid by the purchaser (Report No. 1, 69th Congress, First Session).

The underlying economic theory of all sales taxes is that they are in reality imposed upon and paid by the consumer, although for convenience in collection they are payable by the vendor. For obvious reasons it would be inconvenient and economically impractical for the Government to attempt collection of $13.83 from every buyer of a motorcycle. If he forgot to pay it would cost more than $13.83 for a Revenue Agent to run him down and the force of clerks needed to handle a multitude of buyers' returns would be large and expensive. The same is true with respect to the taxes on sales of theatre tickets and on other articles. For these and other reasons sales taxes must in practice be collected from the buyers by the seller and the seller must be held accountable to the Government for the tax.

It is not improbable that the day will come when the Federal Government will derive most of its revenue from a sales tax instead of from an income tax. The sales tax has its proponents who refer to it as "as tax on spending" and "a tax on consumption". When that day comes must the states and cities pay tax to the Federal Government on everything they buy? Notwithstanding it was held in *Panhandle Oil Company v. Mississippi, 277 U. S. 218,* that they cannot lay a tax on what the Federal Government buys within their borders?

To say that the tax is laid upon the manufacturer and not upon the city is to sacrifice form to substance. In substance and effect the tax was upon the city and was paid in the case at bar by the city.

The question presented here was discussed but not decided in *American-LaFrance Fire Engine Co., Inc., v. Riordan, Collector, 6 F. (2d) 964.*

The broad principles laid down by the great Marshall which have for generations determined the constitutional law of our country ought not now to be departed from and in their place all laws tested by a rule of reason.

All of which is respectfully submitted.

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